No. 182.

Brf. of Clancy for Appellant.

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BRIEF FOR APPELLANT.

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IN THE

Supreme Court of the United States.

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TERRITORY OF NEW MEXICO, APPELLANT,

vs.

THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL.

F. W. CLANCY,
Counsel for Appellant.

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STATEMENT OF CASE.

The Territory, claiming a lien for taxes on property then in the custody of the court, on the 10th day of June, 1897, filed its intervening petition, asking primarily that the taxes be declared a lien on the property, and secondarily that the receiver, in whose hands was the property, should be ordered to pay the taxes, with interest, to the collector of taxes for Valencia County. The taxes claimed were on the improvements on the right of way of the Atlantic and Pacific Railroad Company, where the same runs over what was public domain when the right of way was granted to said company, thirty-three miles in length, valued at $6,500 per mile, making $214,500; on like improvements on the said right of way where it runs over land which was held in private ownership at the time of the grant to the railroad company, 60.7 miles, at same value per mile, making $394,550; and on improvements at eight stations valued at different amounts for different years.

The petition set out that this property had been omitted from assessment for a series of years from 1892 to 1896, and that the collector had, after the tax list for 1896 was delivered to him, listed, valued and assessed the property and entered such assessment on said tax list. The valuation, the rate of tax levied, and amount of taxes, for each year, were severally set out.

On the 23d of June, 1897, the United States Trust Company, complainant in the foreclosure case, and the receiver in whose custody the property then was, filed their verified pleas, which, with accompanying exhibits, cover pages 58 to 103, both inclusive, of the printed record.

From this great mass of words we may extract the admission, made carefully, and repeated five different times:

> "That about fifty-eight miles of said right of way in said county and territory was and is through land which was not government land, but which belonged to private individuals or corporations, and was acquired by the railroad company under and through the right conferred upon it by said act of Congress."

This truthful admission appellants have struggled hard to get away from, but without success. Their attempt to do so will be found set out in the affidavit of their learned counsel at pages 111 and 112 of the printed record. On page 112 he says that he made the admission "simply for the purpose of raising the legal questions to be presented by the pleas," and not as an admission of fact. The ingenuity of man can not find in the pleas any "legal question" to the raising of which this admission was necessary.

The pleas also set up objections to the assessments, and the pendency of another intervening petition in another case, by another petitioner, the collector of Valencia County, asking for taxes of 1892 and 1893 on the basis of earlier, defective and invalid assessments.

The district court dismissed the intervening petition with-

out passing on the pleas. The case was successively appealed to the supreme court of New Mexico, and to this court, and was here argued in 1898. This court passed upon the objections to the validity of the assessments, favorably to the Territory, held that the right of way over the land admitted not to have been public domain, was subject to taxation, and remanded the case for further proceedings in accordance with its opinion.

After the case was remanded to the district court the defendants were permitted to file motions to dismiss while the original pleas in bar were still pending and undisposed of; were then given leave to withdraw those pleas and file a plea in abatement; were then permitted to file a demurrer and afterward pleas in bar, all of which were denied, overruled or held insufficient. Finally the defendants filed an answer to the petition and the case was submitted to the court upon the petition, answer, an agreed statement of facts, and the files and records of the case.

The district court entered a judgment in favor of the Territory for the amount of tax due on 55.5 miles of railroad, arriving at that number from the agreed statement of facts, at a valuation of $6,500 per mile, for the amounts claimed for each year respectively, except that certain levies made to pay judgments against the county were not allowed. The court refused to allow the statutory penalty for failure to make returns of the property for taxation, and refused to allow the statutory interest of 25 per centum per annum on delinquent taxes, but did allow 6 per cent. interest thereon from the date in each year when the tax became delinquent.

Both sides appealed to the supreme court of New Mexico, and that court affirmed the decree with some modifications. It refused to allow any interest on the delinquent taxes, and restored the amounts of the judgment levies. Both sides then appealed to this court.

The Territory has made the following—

ASSIGNMENT OF ERRORS.

In the Supreme Court of the United States.
October Term, 1900.

TERRITORY OF NEW MEXICO, *Appellant*,
vs.
THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL.

Now comes the said Territory of New Mexico and says that there is manifest error in the record and decree of the court below in this cause, and assigns and specifies as error the following:

1. The courts below erred in refusing to hold that plaintiff was entitled to recover taxes on 60.7 miles of railroad.

2. The courts below erred in refusing to hold that defendants were estopped from denying that 58 miles of the railroad were liable to taxation.

3. The courts below erred in refusing to hold that the Territory was entitled to recover interest upon the delinquent taxes at the rate of twenty-five per centum per annum.

4. The courts below erred in refusing to hold that the judgment should bear interest at the rate of twenty-five per centum per annum.

5. The courts below erred in refusing to hold that the Territory was entitled to recover the statutory penalty of twenty-five per centum of the total amount of taxes for each of the years from 1893 to 1896, both inclusive, for failure to make returns for the purposes of taxation, of the property upon which the taxes were due.

Wherefore this appellant prays that the decree and judgment of the supreme court of the Territory of New Mexico be so modified and changed as to correct the errors hereby assigned and complained of, and that this cause be remanded with direction to the supreme court of the territory to render such modified and corrected decree and to award execution thereupon.

F. W. CLANCY,
Counsel for Appellant.

POINTS AND AUTHORITIES.

FIRST.

All that the Court below should have Done was to Ascertain, upon the already Admitted Facts, the Amount of Taxes Due and enter Judgment Therefor.

As has already been stated, the additional assessments were made by the collector upon 60.7 miles of road, which ran over land held in private ownership at the time of the making of the grant. No appeal was ever taken from these assessments as permitted by law, although the record shows that there was ample opportunity for such appeal and the owners of the property should be held to be bound by those assessments, including the valuation put upon the property. The record contained all of the necessary information for the ascertainment of the amount of tax for each year, and it was mere matter of computation to fix the sum.

In any event, it is clear that the five times repeated admission in the pleas sworn to by the solicitor for defendants in 1897—

> "that about 58 miles of said right of way in said county and territory was and is through land which

> was not government land, but which belonged to private individuals or corporations and was acquired by the railroad company under and through the right conferred upon it by said act of Congress,"

estopped defendants to raise the question as to the amount and character of that part of the road.

> Davis *vs.* Wakelee, 156 U. S. 689.
> Railway Company *vs.* McCarthy, 96 U. S. 268.

The most favorable view of the record as it stood when the case was remanded, which could be indulged in favor of appellants, was to compute the amount of tax due on the 58 miles they had admitted.

It may be said that the court below did in effect seek to do just what is here contended for, and there can be but little doubt that the end which the judge of that court had in view was merely to find out the actual number of miles of road of the kind which this court had declared subject to taxation, and to enter judgment for the taxes due thereon at the valuation fixed by the additional assessments; and that, in permitting the appellants to encumber the record with a large number of things like motions to dismiss, demurrers, pleas in abatement, etc., he never lost sight of the main object which he had in view, and that everything which stood in the way was brushed aside before the final hearing.

Upon the final hearing the court found that there were only 55.5 miles of the line of the road subject to taxation. In view of the finding of the supreme court of New Mexico, there can be no doubt that this is absolutely true; but in a case where every possible technical advantage is sought by parties clearly liable for some amount of tax, the court should not hesitate to enforce every possible rule against such parties in favor of the Territory to which the latter can be entitled, whether technical or otherwise; and it is a well-established rule that parties who fail to appeal from assess-

ments when an appeal is provided by statute, are thereafter bound by such assessments, and can not be heard to dispute their correctness in a court of law. Strict enforcement of this rule would show the Territory entitled to recover taxes on 60.7 miles of road. Moreover, at the instance of these appellants, this court has passed upon the sufficiency and validity of the assessments, and in favor of the Territory. If it is said that other and different objections are now urged against the assessments from those which were presented on the former appeal, the answer is that any such objections might have been then presented, and that the declaration by this court of the validity of the assessments is a final adjudication which must be considered as binding.

SECOND.

The Territory is Entitled to Recover Twenty-five per cent Interest on the Taxes.

In the district court it was properly held that the taxes were to be treated as delinquent in each of the years respectively for which they were levied from the dates fixed by law (Rec., p. 293), but interest was allowed from those dates only at the rate of 6 per cent per annum instead of at the statutory rate fixed by section 4066 of the Compiled Laws, at 25 per cent per annum. It is difficult to see why interest was allowed at the rate of 6 per cent unless it was upon some idea of its being harsh and inequitable to apply the statutory rate, or unless the court had in mind the fact of the legislation of 1899 on this subject. As to the first of these surmises there is nothing to be said. If the statute fixes a rate, and is applicable, the court has no discretion. As to the other, it is insisted that the legislation referred to can not properly have any such effect. The supreme court

of the Territory, however, considered that that legislation had the effect of wiping out all interest on delinquent taxes, so that it now becomes necessary briefly to review what was done by the legislature in 1899.

Section 4066 of the Compiled Laws is as follows:

> On the first day of January in each year half of the unpaid taxes for the year past, and on the first day of July in each year, the remaining half of the unpaid taxes for the year past, shall become delinquent, and shall draw interest at the rate of twenty-five per cent per annum, but the collector shall continue to receive payments of the same after the first day of January and July until the day of the sale.

In 1899 an act in relation to the assessment and collection of taxes was passed, of which the tenth section reads as follows:

> Sec. 10. That section 4066 of the Compiled Laws of 1897 be amended so that the same shall read as follows:
>
> "On the first day of January in each year, half of the unpaid taxes for the year last past and on the first day of July in each year the remaining half of the unpaid taxes for the year last past shall become delinquent, and there shall be added on the second day of January and July, one per cent. of the amount of such delinquent taxes as a penalty for non-payment. And unless said taxes shall be paid on or before the first day of the following month, the collector shall add an additional penalty of four per cent of the amount of such delinquent taxes, and upon the happening of the first delinquency above provided for, the collector shall immediately notify the delinquent taxpayer in writing, either personally or by mail, of such delinquency, and of the fact that one per cent penalty has been added to his tax, giving the amount then due, and that unless said taxes and penalty be paid before the first day of the following month, an additional penalty of four per cent will then be added, and in no case shall such penalty be released, abated, rebated, or reduced by

> any person, but it shall have the full force and effect of the original tax, and become part of the same, and any failure on the part of the collector to add such penalty and collect the same shall subject him to removal from office, and to pay double the amount of such penalty; one-half thereof to the county current expense fund, and one-half to the territorial interest fund, which amounts shall be collected from him and the sureties on his bond, and he may be removed from office therefor by the board of county commissioners. Provided that proof of the giving or the mailing by the collector of notice of delinquency mentioned in this section or the proof of the receipt of such notice by the taxpayers shall not be necessary to the imposition and collection of the penalties hereby created.

It is obvious that the effect of section 10 of the act of 1899 was to do away with the twenty-five per cent rate of interest on delinquent taxes, at least for the future. It is not clear that there was any intention by this amendment of section 4066 to wipe out the interest which had already accrued on delinquent taxes. In saying this there is no intention to ignore the very respectable authorities which hold that a statute repealing an earlier law imposing a penalty, without any reservation as to penalties already accrued, will operate to destroy all right to the recovery of such penalties even in cases pending at the time of the repeal; nor the fact that there are cases which hold that interest on taxes is to be considered in the light of a penalty.

These adjudications should not be held applicable in the present case for the reason that interest, which is properly nothing but a payment for the use of money, ought not to be considered as a penalty, and even if it can be so classed, as a general proposition, this must give way to clearly expressed legislative intent. It is clear that the legislature, in enacting laws with regard to taxation in New Mexico, has had in mind as distinct and separate things, penalties and interest, and do not use the one word for the other. It was

provided by section 4066 that delinquent taxes should draw interest. While there may have been in the enactment of this statute and the fixing of a rate of twenty-five per cent per annum, some idea of accelerating payment of taxes by the imposition of this burden, yet the main idea was to give the public treasury compensation for the great and varied increase of expense occasioned by such delinquencies. It is to be borne in mind also that when this section was originally enacted in 1882 the ruling rate of interest in New Mexico was not greatly below that fixed on these delinquent taxes. Money was worth much more at that time than it is at present.

The legislature, however, has elsewhere provided for penalties by that name, as will be seen by reference to sections 4035, 4036 and 4060 of the Compiled Laws, and by section 11 of the same act of 1899, in addition to what is said in section 10 above quoted. There can be no doubt that the legislature has not at any time considered interest on delinquent taxes and penalties as being one and the same thing.

The statutes referred to are as follows:

> Sec. 4035. If any person, liable to taxation, shall fail to render a true list of his property, as required by the preceding three sections, the assessor shall make out a list of the property of such person, and its value, according to the best information he can obtain; and such person shall be liable, in addition to the tax so assessed, to the penalty of twenty-five per cent thereof, which shall be assessed and collected as a part of the taxes of such person.
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> Sec. 4036. If any person liable to taxation shall knowingly make a false list of his property subject to taxation in this Territory, for the purpose of avoiding any proper assessments of taxes, he shall be liable to a penalty of twenty-five per cent, to be added to the amount of the taxes assessed upon the true amount and value of his property, and shall also be deemed guilty of perjury.
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> Sec. 4060. The officer collecting taxes, so certified

into another county, shall, in addition to the penalties provided by law on delinquent taxes, assess and collect the further penalty of ten per cent on the amount of such taxes, and when collected shall transmit the amount to the collector of the county where such taxes were levied, less the said penalty of ten per cent. If in his opinion such taxes can not be collected, the officer shall return the abstract with his certificate thereon that the taxes are uncollectible.

Sec. 4067. The collector shall, in all cases, make out and deliver to the taxpayer a receipt, stating the time of payment, the description and assessed value of each parcel of real estate and the assessed value of personal property; the amount of each kind of tax, the interest on each and costs, if any, giving a separate receipt for each year; and he shall make the proper entries of such payment on the books of his office.

Sec. 11. That section 4067 of the Compiled Laws of 1897 be amended by striking out the word "interest" therein and inserting the word "penalty," as provided in the preceding section.

Laws of 1899, p. 51.

Were there any doubt as to the intention of the legislature not to favor delinquent taxpayers by remitting the accumulated interest, that doubt would be removed by an examination of section 34 of the act of 1899, which reads as follows:

Sec. 34. All acts or parts of acts in conflict herewith, either general or special, are hereby repealed, and this act shall take effect and be in force from and after its passage: Provided, that the provisions of this act shall not affect or be applicable to taxes heretofore assessed, or which are delinquent at the date of the approval hereof, except that suit for the same may be brought and judgments thereon rendered in the manner provided by this act, but the validity of such delinquent taxes shall be determined

by the law in force at the time of making the assessment therefor. The time for the payment of all taxes now delinquent is hereby extended until May 1, 1899, and when the same may be in litigation at the date of the passage of this act, until such litigation shall be determined.

There can be no reasonable doubt that the effect of the proviso in the above quoted section, is to leave all taxes already assessed or delinquent in the condition in which the legislature found them at the date of the passage of the act, and it would be a very artificial and strained construction which should hold that the legislature did not intend to preserve the right to recover interest on the delinquent taxes. It is true that the section provides for an extension of time for the payment of delinquent taxes until May 1, 1899, but there is no hint in this extension of time that any interest or penalty which had accrued should be remitted. The only effect of such extension would be to make it impossible for personal property to be distrained, or real estate sold by the collector, or any suit to be brought for the collection of taxes, until after the expiration of the time.

The further action of the legislature only a few days later shows conclusively that this was the legislative intent. The act being on the same subject and passed at so nearly the same time, must certainly be construed with the earlier one as *in pari materia*, and effect should be given to it unless clearly inconsistent with the first statute, as though both had been enacted at the same time.

Sutherland on Statutory Construction, Sections 283, 288.

The second enactment of 1899 will be found at page 106 of the Session Laws, and the first section of that act reads as follows:

Section 1. That all accrued penalties and interest upon taxes now or heretofore in this year delinquent,

shall be remitted upon all such taxes which have been or shall be paid on or before the first day of July, A. D. 1899. *Provided, however*, that in all cases where taxes are now the subject of litigation the time for such payment as aforesaid is extended only to the first day of July, 1899, and if not paid on or before such first day of July, no abatement of interest or penalties shall thereafter be made.

From the language of this section it is perfectly clear that the legislature considered that it had in no way wiped out accrued penalties and interest on delinquent taxes, as it offered to remit the same provided that payment of the taxes were made on or before the first day of July. This was like an offer of compromise with the delinquent which would be effective only if accepted and acted on within a limited time, and it was distinctly pointed out that if not acted on by the first day of July no abatement of the accrued interest or penalties would be made. Taking the two acts together, all possible doubt as to the legislative intent is certainly removed, and the legislative intent is what must prevail so long as the legislature does not transcend the limitations imposed by the organic law.

The conclusion is irresistible that the 25 per cent on delinquent taxes was preserved unless the delinquents made payment between the 16th of March and the 1st of July. In the present case the delinquent owners of the railroad property did not see fit to accept what was offered by the Territory, and they have at no time during the prosecution of this litigation, either in the courts below or in their brief filed in case No. 181, made any claim under the legislation of 1899. Their counsel evidently does not consider the question as in any manner affected by that legislation, as he rests his claim as to the interest upon the ground that the taxes should not be considered as delinquent until the first of January after the additional assessments were made in June, 1897.

THIRD.

The Territory is Entitled to Recover the Penalty of Twenty-five per cent of the Amount of the Taxes for Failure to Make Returns.

It appears from the Record that no returns of the property sought to be taxed were made by any one for the years 1893, 1894, 1895 and 1896. Section 4035 of the Compiled Laws reads as follows:

> If any person, liable to taxation, shall fail to render a true list of his property as required by the preceding three sections, the assessor shall make out a list of the property of such person, and its value, according to the best information he can obtain; and such person shall be liable, in addition to the tax so assessed, to the penalty of twenty-five per cent thereof, which shall be assessed and collected as a part of the taxes of such person.

It will be observed that this section of the statute declares a liability in addition to the tax for a penalty of 25 per cent of the amount of the tax. This is a penalty arising by operation of law and can not be made dependent for its existence or enforcement upon the action or non-action of an assessor or collector. It is a punishment for a failure to comply with the law of the Territory, and the Territory is entitled to recover it in a suit of this kind, no matter what may have been done or not done by the assessing or collecting officers.

It is respectfully submitted that the judgment of the court below should be set aside, or at least so changed as to give the Territory that to which it is entitled as hereinbefore set forth.

F. W. CLANCY,
Counsel for Appellant.